Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1471

RONNIE LITTLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Ronnie Little, your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on November 20, 1978.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on November 20, 1978. At the present time the case decided by the Court of Appeals has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 20, 1978. A timely petition for rehearing with suggestions of appropriateness of rehearing en banc was filed December 29, 1978. On February 8, 1979 by order of the Supreme Court the appellant was granted an extension to file his Writ until March 24, 1979.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I

Does a list of items prepared by an insurance agent after a burglary qualify as a record kept in the regular course of business under Federal Rules of Evidence Rule 803(6) and former Rule 28 U.S.C.A. §1732?

RULES INVOLVED

The Rule involved herein is Federal Rule of Evidence Rule 803(6). This Rule states as follows:

Rule 803

Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

STATEMENT OF THE CASE

This is an appeal by Ronnie Little from a conviction under a two count indictment charging him with a violation of Section 23.14, Title 18 United States Code. One Donald E. Robertson was charged under the same indictment. Little and Robertson were charged under Count One with transporting in interstate commerce, from Waterloo, Illinois, various stolen goods and merchandise of the value of over $5,000.00, and under Count Two, for conspiring to transport the said goods. Each defendant was convicted under both Counts of the indictment, and Little was sentenced to seven years under Count One and a two year concurrent sentence under Count Two.

The trial commenced on May 24, 1978 and lasted two days. During that trial, the Court ruled that Government's Exhibit Number 1 was a record kept in the regular course of business and held it admissible in evidence. Exhibit Number 1 was a list of items which had been shipped to William Nobbe and Company, the burglarized firm, by John Deere Company, its parent company, compared to what was missing after the bur-

glary. Robert Nobbe, part owner of the burglarized firm, was the only witness called by the Government to testify about this list. His testimony showed that he had no personal knowledge of the items taken, nor did he in any way prepare the list which was Government's Exhibit Number 1. Nor did Mr. Nobbe know if the list was correct. (TR.25).

On May 25, 1978, the District Court entered a jury verdict of guilty against petitioner Ronnie Little. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. The jurisdiction of the latter court was invoked under 28 USC §1291 and Federal Rules of Appellate Procedure Rule 3 and 4(b). On November 20, 1979, the Court issued its opinion affirming the conviction of Petitioner Ronnie Little. Petitioner filed a timely petition for a rehearing which was denied.

REASON WHY THE WRIT SHOULD BE GRANTED

The Decision below is in conflict with the Decisions of other Court of Appeals on the same matter.

Under this set of facts, Exhibit Number 1 was not a record made by Mr. Nobbe in the regular course of business. It was simply a copy of notations written on an invoice made by someone else and sent to Nobbe's company. Federal Rules of Evidence Rule 803(6) and former Rule 28 U.S.C.A. §1732 allowed documents made in the course of business to be submitted into evidence if they were made in the regular course of business for a company in whose files the documents were found. *Phillips v. U.S.*, 356 F 2nd 297, 307 (C.A. 9, 1965); *Taylor v. B. Heller and Company*, 364 F 2nd . . . (C.A. 6, 1966); *Gray v. L. J. Navy Trucking Company, Inc.*, 475 F 2nd 545, 548, 549 (C.A. 6, 1973). These requirements have not been met, so the court misapplied the law to this factual situation.

The Court of Appeals chose not to view the introduction of Exhibit Number 1 as prejudicial. But as it is the only testimony placing the value of the stolen goods at over $5,000.00, it is extremely prejudicial. The Court felt that Nobbe had independently concluded that the amount of the stolen goods exceeded this sum, but he was merely restating Exhibit Number 1 when so testifying.

In reviewing the decisions of the districts there does not seem to be one sound workable rule with which to apply the Business Record provision. This inconsistent application of this rule only leads to unjust determination of what is or what should be classified and admitted as a business record.

CONCLUSION

The issue presented here by this cause is of importance and, therefore, it is respectfully requested that this court issue a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 78-1432
United States of America,
Appellee,

v.

Donald E. Robertson,
Appellant.

No. 78-1462
United States of America,
Appellee,

v.

Ronnie Little,
Appellant.

} Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: October 16, 1978

Filed: November 20, 1978

Before Bright, Stephenson and Henley, Circuit Judges.

Stephenson, Circuit Judge.

Defendants Ronnie Little and Donald E. Robertson appeal from convictions under a two-count indictment. Defendants were convicted on Count I of violating 18 U.S.C. § 2314 by transporting in interstate commerce various stolen goods with

a value of more than $5,000, knowing the goods to have been stolen, and on Count II of conspiring to transport the same goods in violation of 18 U.S.C. § 371.[1]

The evidence produced at trial disclosed that the defendants, along with coconspirators Charles and Ralph Axelson and Boyd Hicks, broke into a John Deere farm equipment sales and service store, William Nobbe & Company, located in Waterloo, Illinois, late in the evening of June 25, 1975, or early in the morning of June 26, 1975. Various merchandise including lawnmowers, bicycles and mechanics' tools were stolen and transported to St. Louis, Missouri, where they were unloaded and stored at the home of Little. The primary damaging testimony was elicited from coconspirators Charles and Ralph Axelson. In return for their testimony they received immunity from prosecution on these charges and the United States Attorney wrote a letter to the parole board in El Reno, Oklahoma, where they were incarcerated on other convictions, explaining that they had cooperated in the prosecution of the defendants in this case.

On this appeal both defendants argue five identical issues and Little raises two additional claims of error.[2] Initially both defendants contend that the district court should have granted their motions to dismiss because of pre-indictment delay.

[1] Defendant Robertson received a sentence of five years on Count I and a concurrent two-year sentence on Count II. Defendant Little received a sentence of seven years on Count I and a concurrent two-year sentence on Count II. The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, presided at the jury trial.

[2] Little listed three other arguments in his brief under "Issues Presented for Review," but did not argue them, either in the brief or during oral argument. We consider these issues to have been waived. In any event, the additional charges of court error in overruling the motion for bill of particulars, motion for production of witnesses prior to trial, and motion for records of grand jury vote are not demonstrated to be worthy of further consideration.

The crimes occurred approximately 34 months before the indictment. The uncontroverted statement of the government is that the first information about the crime implicating the defendants was received on September 23, 1976, approximately 15 months after the crime. On November 6, 1976, the government was able to confirm some of the information. Active investigation of the case continued until March 1, 1977. At that time the government concluded it was necessary to secure the cooperation of the Axelsons in order to convict the defendants. This cooperation was finally achieved on March 22, 1978. Sixteen days later the defendants were indicted.

Neither the time during which the government was completely unaware of the defendants' involvement in the crime, nor the period of active investigation by the government, should be considered in support of a pre-indictment delay claim. *See United States v. Lovasco*, 431 U.S. 783 (1977). Thus, only 16 days of the elapsed time are unaccounted for. This is not an impermissible delay. Moreover, no specific incident of prejudice resulting from the delay is even alleged by the defendants. *Compare United States v. Naftalin*, 534 F.2d 770 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976), *with United States v. Barket*, 530 F.2d 189 (8th Cir.), *cert. denied*, 429 U.S. 917 (1976). *See generally* Preindictment Delay in the Eighth Circuit, 26 Drake L. Rev. 110 (1978).

The next issue raised by the defendants is that the district court erred in not granting their motions for severance of the offenses and for separate trials for the defendants. The defendants filed pretrial motions requesting severance and they were denied. The motions were not renewed at the end of the government's evidence nor at the conclusion of all of the evidence. Therefore, the defendants have waived the right to assert the severance issue. *United States v. Pelton*, 578 F.2d 701, 711 (8th Cir. 1978). Moreover, examination of the record fails to disclose any prejudice to the defendants as a result of the joinder of offenses and defendants.

Another claim of error asserted by both defendants is the admission into evidence of government's Exhibit 1. Exhibit 1 is a list of the merchandise shipped to William Nobbe & Company from John Deere Company. Also included in the Exhibit is a column specifying the cost of each item to William Nobbe & Company. Another column labeled "Out of Stock" was usually filled out when an item was sold. In Exhibit 1 this column contains the notation "stolen" in connection with several items. These notations were apparently made by the insurance adjustor to indicate merchandise which had been received by William Nobbe & Company and which could not be accounted for after the burglary. It was error to admit Exhibit 1 into evidence in its entirety because the notation "stolen" was not entered on Exhibit 1 in the ordinary course of William Nobbe & Company's business. *See Hiram Ricker & Sons v. Students Int'l Mediation Soc'y*, 501 F.2d 550, 554 (1st Cir. 1974); *Picker X-Ray Corp. v. Frerker*, 405 F.2d 916, 922-24 (8th Cir. 1969); *Williams v. United States*, 323 F.2d 90, 95 (10th Cir. 1963); *Hartzog v. United States*, 217 F.2d 706, 709-10 (4th Cir. 1954); Fed. R. Evid. 803(6). *Compare Cullen v. United States*, 408 F.2d 1178, 1179-80 (8th Cir. 1969). However, the Exhibit was admissible in all other respects as a record kept in the regular course of business. It was admissible to show the items which John Deere Company had shipped to William Nobbe & Company. It also provided evidence of which items were on hand as of June 25, 1975, and their value.

The defendants contend that their convictions should be reversed because Exhibit 1 provided the only evidence that the value of the goods exceeded $5,000, as is required by the statute. We conclude, however, that the error was not prejudicial to the defendants. Robert Nobbe, a part-owner of William Nobbe & Company, was allowed without objection to use Exhibit 1 as an aid in his testimony concerning what merchandise was stolen and its value. In response to the prosecuting

attorney's question, "Have you been able to establish a total value for the items taken?" Nobbe responded, "Somewhere over $14,000." In addition, defendants' counsel used Exhibit 1 in their cross-examination of Nobbe. The only objection to Exhibit 1 came when the government introduced Exhibit 1 into evidence at the end of its case. At that time admission of the Exhibit was only cumulative and non-prejudicial. Nobbe had earlier testified that $4,000 worth of mechanics' tools not included in the Exhibit had been stolen, and in their testimony coconspirators Charles and Ralph Axelson had described the stolen property. The description of the stolen property corresponded with items listed in Exhibit 1 with a total value well in excess of $5,000. Charles Axelson stated that they took four riding lawnmowers, a number of power tools, tool chests, garden hoses, lawn trimming equipment, push lawnmowers and bicycles. Ralph Axelson similarly testified that they stole garden tractors, lawnmowers, bicycles, garden hoses, tools, and a variety of other things. Under all the circumstances we are satisfied that there was sufficient evidence from which the jury could properly find that the total value of the stolen goods exceeded $5,000.

At trial the defendants objected to all of the court's instructions on conspiracy. On this appeal the defendants only contest the instruction which defined conspiracy as "a combination or agreement of two or more persons to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means." Defendants argue that instead of "of," the district court, in its instruction, should have used the word "among" to convey to the jury that there must be an actual meeting of the minds of the participants in a conspiracy. This argument ignores the fact that when the conspiracy instructions are considered as a whole it is clear that the jury was informed that to find a conspiracy they must find that the defendants had a mutual understanding to try to accomplish a common and unlawful plan. The court's instructions properly defined con-

spiracy. *See* 2 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 27.04 (3d ed. 1977).

The final issue raised by both defendants is that the district court erred in denying their motions for acquittal at the end of the government's case and at the close of all the evidence. The basis for this argument is that the convictions rest upon the erroneous admission of Exhibit 1 and the obviously untruthful testimony of Charles and Ralph Axelson. The defendants' claim with respect to Exhibit 1 has been discussed, *supra*, and will not be restated here. In support of their claim that the testimony by the Axelsons was insufficient to support a conviction, the defendants point out various inconsistencies in their testimony concerning details of the burglary. The defendants fail to mention the far greater similarities in the Axelsons' testimony concerning the major aspects of the burglary which occurred almost three years prior to trial and the fact that some of their testimony was corroborated by other witnesses. The inconsistencies in the Axelsons' testimony and their motives to testify falsely were vigorously argued to the jury by defendants' counsel. The jury resolved the matter of credibility of the witnesses against the defendants and the jury's determination will not be overturned by this court on appeal. *See, e.g., Hodgdon v. United States*, 365 F.2d 679, 685-86 (8th Cir.), *cert. denied*, 385 U.S. 1029 (1966).

Two additional issues are raised by defendant Little on this appeal. First, he claims that the court's instruction on reasonable doubt was in error. This contention is without merit. The identical instruction was approved by this court in *United States v. Knight*, 547 F.2d 75, 77 (8th Cir. 1976). Second, he argues that the court should have dismissed the indictment because it was deficient in several respects. We have considered each of Little's claims and are satisfied that the district court properly denied his motion to dismiss the indictment.

After a careful examination of the record we are convinced that the defendants received a fair trial and the convictions should be affirmed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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